



Rules and Ancillary Document Review Checklist
(This form must be filled out electronically.)

All responses should be in **bold** format.

Document Reviewed (include title): **WAC 458-20-118 (Sale or rental of real estate, license to use real estate)**

Date last adopted: **December 28, 1990**

Reviewer: **D. Douglas Titus**

Date review completed: **February 23, 2000**

Is this document being reviewed at this time because of a taxpayer or business association request? (If "YES", provide the name of the taxpayer/business association and a brief explanation of the issues raised in the request). **YES** ☐ **NO** ☒

Type an "x" in the column that most correctly answers the question, and provide clear, concise, and complete explanations where needed.

1. Explain the goal(s) and purpose(s) of the document:

Amounts derived from the sale or rental of real estate are exempt from the B&O tax. Rule 118 clarifies what constitutes a tax-exempt lease or rental of real estate. It also explains when a taxable license to use real estate exists.

2. Need:

YES	NO	
X		Is the document necessary to comply with or clarify the application of the statutes that are being implemented? (E.g., does it provide detailed information not found in the statutes, reduce the need for taxpayers to search multiple rules or statutes to determine their tax-reporting responsibilities, help ensure that the tax law and/or exemptions are consistently applied, etc?)
	X	Is the document obsolete to a degree that the information it provides is of so little value that the document warrants repeal or revision?
	X	Have the laws changed so that the document should be revised or repealed? (If the response is "yes" that the document should be repealed, explain and identify the statutes the rule implemented, and skip to Section 10.)
X		Is the document necessary to protect or safeguard the health, welfare (budget levels necessary to provide services to the citizens of the state of Washington), or safety of Washington's citizens? (If the response is "no", the recommendation must be to repeal the document.)



Please explain. **This rule provides important tax-reporting information that reduces the need for taxpayers to search multiple rules or statutes to determine their tax-reporting responsibilities.**

3. Related ancillary documents, court decisions, BTA decisions, and WTDs: Complete Subsection (a) only if reviewing a rule. Subsection (b) should be completed only if the subject of the review is an ancillary document. Excise Tax Advisories (ETAs), Property Tax Bulletins (PTBs) and Audit Directives (ADs) are considered ancillary documents.

(a)

YES	NO	
	X	Are there any ancillary documents that should be incorporated into this rule? (An Ancillary Document Review Supplement should be completed for each and submitted with this completed form.)
	X	Are there any ancillary documents that should be repealed because the information is currently included in this or another rule, or the information is incorrect or not needed? (An Ancillary Document Review Supplement should be completed for each and submitted with this completed form.)
	X	Are there any Board of Tax Appeal (BTA) decisions, court decisions, or Attorney Generals Opinions (AGOs) that provide information that should be incorporated into this rule?
	X	Are there any administrative decisions (e.g., Appeals Division decisions (WTDs)) that provide information that should be incorporated into the rule?

(b)

YES	NO	
	NA	Should this ancillary document be incorporated into a rule?
	NA	Are there any Board of Tax Appeal (BTA) decisions, court decisions, or Attorney Generals Opinions (AGOs) that affect the information now provided in this document?
	NA	Are there any administrative decisions (e.g., Appeals Division decisions (WTDs)) that provide information that should be incorporated into the document?

If the answer is “yes” to any of the questions in (a) or (b) above, identify the pertinent document(s) and provide a brief explanation of the issue(s).

There are no documents ancillary to this rule.

4. Clarity and Effectiveness:

YES	NO	
X		Is the document written and organized in a clear and concise manner?
X		Are citations to other rules, laws, or other authority accurate? (If no, identify the incorrect citation below and provide the correct citation.)
X		Is the document providing the result(s) that it was originally designed to achieve?
	X	Do changes in industry business methods warrant repealing or revising this document?



	X	Do any administrative changes within the Department warrant repealing or revising this document?
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Please explain. **The rule as written is organized in a clear manner. The rule is effective as written and provides tax-reporting information which is not available elsewhere.**

At such time as the Department of Revenue chooses to revise Rule 118, however, the rule should be:

- **Rewritten in the format currently utilized by the Code Reviser's Office and the Department; and**
- **Revised to delete the provisions relating to hotel, motels, tourist courts, etc. in Subsections (2) and (3)(c), and taxpayers referred to WAC 458-20-166.**

5. Intent and Statutory Authority:

YES	NO	
X		Does the Department have sufficient authority to adopt this document? (Cite the statutory authority in the explanation below.)
X		Is the information provided in the document consistent with the statute(s) that it was designed to implement ? (If "no", identify the specific statute and explain below. List all statutes being implemented in Subsection 9, below.)
	X	Is there a need to recommend legislative changes to the statutes being implemented by this document?

Please explain. **This rule was adopted under the provisions of RCW 82.32.300, which authorizes the Department to adopt and publish rules to explain the provisions of the Revenue Act.**

6. Coordination: Agencies should consult with and coordinate with other governmental entities that have similar regulatory requirements when it is likely that coordination can reduce duplication and inconsistency.

YES	NO	
	X	Could consultation and coordination with other governmental entities and/or state agencies eliminate or reduce duplication and inconsistency?

Please explain. **The Department of Revenue has the exclusive authority to administer the B&O and retail sales taxes in this area.**

7. Cost: When responding, consider only the costs imposed by the document and not by the statute.

YES	NO	
	X	Have the qualitative and quantitative benefits of the document been considered in relation to its costs? (Answer "yes" only if a Cost Benefit Analysis was completed when the rule was last adopted or revised.)

Please explain. **This is an interpretive rule that imposes no new or additional administrative burdens on businesses that are not already imposed by law.**



8. Fairness: When responding, consider only the impacts imposed by the document and not by the statute.

YES	NO	
X		Does the document result in equitable treatment of those required to comply with it?
	X	Should it be modified to eliminate or minimize any disproportionate impacts on the regulated community?

Please explain. **This document currently results in the equitable treatment of those required to comply with it.**

9. LISTING OF DOCUMENTS REVIEWED: (Use “bullets” with any lists, and include documents discussed above. Citations to statutes, ancillary documents, and similar documents should include titles. Citations to Attorneys General Opinions (AGOs) and court, Board of Tax Appeals (BTA), and Appeals Division (WTD) decisions should be followed by a brief description (i.e., a phrase or sentence) of the pertinent issue(s).)

Statute(s) Implemented: **To the extent these statutes apply to taxation of persons selling, renting, or granting licenses for the use of real estate:**

- **RCW 82.04.050** (Defines “sale at retail,” and “retail sale”);
- **RCW 82.04.080** (Defines “gross income of the business”);
- **RCW 82.04.190** (Defines “consumer”);
- **RCW 82.04.220** (Business and occupation tax imposed);
- **RCW 82.04.250** (Tax on retailers);
- **RCW 82.04.290** (Tax on . . . service activities);
- **RCW 82.04.390** (Exemptions--Amounts derived from sale of real estate);
- **RCW 82.04.440** (Persons taxable on multiple activities--Credits);
- **RCW 82.08.020** (Tax imposed--Retail sales . . .); and
- **RCW 82.08.0254** (Exemptions--Nontaxable sales).

Ancillary Documents (i.e., ETAs, PTBs, and ADs):

- **ETA 232.08.118** (Parking Fees as Income from Rental of Real Estate). This document was previously reviewed in conjunction with **WAC 458-20-129** (Gasoline service stations).

Court Decisions:

- **Harbour Village Apartments v. Mukilteo** , Docket No. 66920-1, slip op. (Wash. 1999), held that a flat fee imposed by a city only on residential rental property was an unconstitutional property tax, and not an excise tax, characterizing the incidence of the tax as the mere ownership of that subclass of real property defined by its rental use, and not on the rental transaction itself.

Board of Tax Appeals Decisions (BTAs):

- **Lane and Lane v. Department of Revenue**, BTA Docket No. 46189 (1999), held that the B&O exemption for proceeds from real estate does not cover interest or finance charges arising out of real estate transactions; and



- **United Parking v. Department of Revenue**, BTA Docket Nos. 42608 & 42670 (1994), held that long term agreements for the erection of outdoor advertising signs was a license to use real estate and not a rental of real estate.

Administrative Decisions (e.g., WTDs):

- **Determination No. 96-173, 18 WTD 1 (1999)**, held that where the use of space in an antique mall is conveyed by a written agreement purporting to be a lease and where the space is identified with particularity in the agreement and at the physical location, and where the agreement specifies a certain term, as well as notice for termination, the arrangement will be construed as a rental or lease of real property, as opposed to a license to use same;
- **Determination No. 92-213, 13 WTD 108 (1993)**, held that income from trade show space was subject to service B&O tax where the trade show is open to the public;
- **Determination No. 92-297, 12 WTD 461 (1992)**, held that whether the legal relationship between two parties as to an interest in real property is landlord-tenant or licensor-licensee will be determined by reference to the definitions of those terms in the statute and in the rule, and by the weight of the evidence;
- **Determination No. 92-100, 12 WTD 349 (1992)**, held that arrangement whereby individual physicians rent single offices in a building owned, operated, and managed by their partnership will be deemed rental of real estate where a landlord-tenant relationship is shown to exist;
- **Determination No. 91-163, 11 WTD 203 (1991)**, held that shopping mall rental receipts are not bifurcated and thus taxable if part of the rent was designated to be used for advertising purposes; and
- **Determination No. 93-011, 12 WTD 565 (1993)**, held that the same room, contracted in advance, must be continuously occupied by an airline, through its employees, for a period in excess of one month before the sale/rental exemption applies.

Attorneys General Opinions (AGOs): None

Other Documents (e.g., special notices or Tax Topic articles, statutes or regulations administered by other agencies or government entities, statutes, rules, or other documents that were reviewed but were not specifically relevant to the subject matter of the document being reviewed):

Rule 118 refers to the following regulations:

- **WAC 458-20-133 (Frozen food lockers);**
- **WAC 458-20-159 (Consignees, bailees, factors, agents and auctioneers);**
- **WAC 458-20-167 (Educational institutions, school districts, student organizations, and private schools); and**
- **WAC 458-20-182 (Warehouse businesses).**

The following regulations both refer to and are referred to by Rule 118:

- **WAC 458-20-119 (Sales of meals);**
- **WAC 458-20-130 (Sales of real property, standing timber, minerals, natural resources);**



- WAC 458-20-166 (Hotels, motels, boarding houses, rooming houses, resorts, summer camps, trailer camps, etc.); and
- WAC 458-20-244 (Food products).

The following regulations refer to Rule 118:

- WAC 458-20-105 (Employees distinguished from persons engaging in business);
- WAC 458-20-146 (National and state banks, mutual savings banks, savings and loan associations and other financial institutions);
- WAC 458-20-183 (Amusement, recreation, and physical fitness services);
- WAC 458-20-189 (Sales by and to the state of Washington, counties, cities, towns, school districts, and fire districts); and
- WAC 458-20-200 (Leased departments).

The following were examined during this review:

- 22 U.S.C. 4301 et seq. (relating to regulation of foreign missions);
- RCW 36.100.040 (Excise tax imposed in public facilities districts--Hotel, motel, rooming house, trailer camp, etc. charges--Ballot proposition--Rate);
- RCW 67.28.180 (Special excise tax authorized--Hotel, motel, rooming house, trailer camp, etc., charges--Conditions imposed upon levies); and
- RCW 67.40.090 (Special excise tax imposed in King County--Hotel, motel, rooming house, trailer camp, etc., charges--Rates--Proceeds).

10. Review Recommendation:

_____ Amend

_____ Repeal

_____ **X** Leave as is

_____ Begin the rule-making process for possible revision. (Applies only when the Department has received a petition to revise a rule.)

_____ Incorporate ancillary document into a new or existing rule. (Subject of this review must be an ancillary document and not a rule.)

Explanation of recommendation: (If recommending an amendment of an existing rule, provide only a brief summary of the changes you've identified/recommended earlier in this review document.)

The rule is concise and sufficiently well written as it is.

11. Manager action: Date: _____

_____ Reviewed recommendation

_____ Accepted recommendation



_____ Returned for further action

Comments: